

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1221

United States Court of Appeals
For the Second Circuit

B
AS

UNITED STATES OF AMERICA,

Appellee.

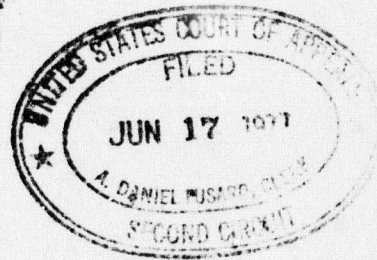
-against-

FRANCIS E. KING,

Appellant.

*Appeal from the United States District
Court for the Eastern District of New York*

APPELLANT'S BRIEF



FRANCIS E. KING
Pro Se

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

FRANCIS E. KING,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK.

PRELIMINARY STATEMENT

The indictment herein charged the appellant with the following counts relative to the Internal Revenue Code.

1. That on April 15, 1971 in the Eastern District of New York, appellant, a resident of Commack, New York, willfully and knowingly made and subscribed a 1970 U.S. Individual Income Tax Return wherein he reported adjusted gross income of \$16,863 whereas he knew that his adjusted gross income for the calendar year 1970 was substantially in excess of \$16,863. Section 7206(1).

4. Failure to file a return for the calendar year 1973.

Section 7203.

5. Knowing and willfully attempting to evade payment of income tax approximating \$29,490.12 by failing to file a return for 1973.

Section 7201.

6. Willfully made and subscribed an application for extension of time to file his return for 1973, which was verified by a written declaration that it was made under the penalties of perjury, indicating that he had timely filed

individual income tax returns for each of the year immediately preceding 1973, whereas the defendant knew he had not filed an individual income tax return for 1971. Section 7206(1).

Counts 2 and 3 of the indictment were dismissed.

As a consequence of the conviction the appellant was sentenced to three years imprisonment on counts 1 and 6; five years on count 5 and one year on count 4, each count to run concurrently. He was also fined \$5,000 each on counts 1 and 6 and \$10,000 each on counts 4 and 5 for a total of \$30,000.

STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW:

1. Did the government expert witness commit such error with regard to 1970 as to render his testimony useless?
2. Did the government's proof establish that any part of the crime with regard to 1970 was committed in the Eastern District of New York?
3. Was there sufficient proof to support the conviction of the appellant for any of the charges especially with regard to 1973?
4. Was the defendant's rights under the constitution prejudiced by violation of due process and res judicata since he was acquitted previously for similar charges?
5. Was the alleged false statment as related in count 6 proven to be material?
6. Was the government guilty of selective prosecution with regard to the facts submitted herein?

7. Was an overt act proved for 1973?
8. It is apparent that illegal wire tap evidence was used with regard to obtaining leads for this investigation.

STATEMENT OF CASE AGAINST
THE APPELLANT:

FRANCIS KING was charged with being a member of a specified conspiracy among members of the Special Investigation Unit of the New York City Police Department between the years 1969 and 1972, the purpose of which was to violate the civil rights of citizens by depriving them of money or property without due process of law. The defendant was acquitted on May 22, 1976 of that charge after a jury trial before the Honorable Jack B. Weinstein, U.S. District Judge, Eastern District of New York, 75 Cr. 93. At that trial it was admitted that the Internal Revenue Service had begun an investigation of the defendant's income tax returns. The exact same evidence regarding expenditures were apparently used in the conspiracy trial. See Memorandum of the U.S. Attorney dated December 21, 1976.

FRANCIS KING separated from his first wife in April 1970 (A 338), returned for a short period in August 1970 (A346). After the separation in April 1970, Mr. King provided Mrs. King with \$125.00 a week (A344). On October 1, 1970 the defendant rented apartment 1K at 15 St. Andrew's Place, Yonkers, New York for \$205.00 a month (A66). Thus he resided since October 1, 1970 in Yonkers, New York. No testimony was elicited if timely

payment was made of the rent. Purchases of furniture including sales tax from Brenner's Furniture was determined to equal \$6,585.19 (A89). Mrs. King did not recall whether she signed the 1970 return (A347).

The government's proof for 1970 and 1973 was based on the expenditures method of proof. Based on their theory of proof, 1970 figures allegedly indicated that expenditures exceeded adjusted gross income by approximately \$1,723. Alleged expenditures per investigation totaled \$18,586, and adjusted gross income per the return totaled \$16,863, (Exhibit 83) (A411-412). These included support payments to his first wife as of April 1, 1970 at \$125.00 a week for a total of \$4,875; \$6,585.09 for furniture purchase from Brenner's which includes sales tax; rental at 15 St. Andrew's Place totalling \$820.00; automobile expenditures of \$1,440 (computed at 12,000 miles @ \$.12) and sales tax of \$166.00. The agent indicated that if expense reimbursement is greater than the amount spent, the additional monies received over and above expenditures is income (A540). It should be noted that no expense reimbursement was received by Mr. King.

The charges for the year 1971 were dismissed. Although not charged with any crime for the year 1972, testimony relating to income and expense thereto were admitted. It should be noted that the testimony relating thereto was prejudicial and wholly without relevance to the indictments.

It is conceded that Ann King, the defendant's second wife, in March 1974 (A669) suffered a nervous breakdown. The defendant in accordance with the rules and regulations of the Internal Revenue Service requested an extension to file a return for the year 1973. He truthfully related the reason for the necessity therefor and allegedly erroneously reported that he had timely filed his return for 1971. Based on his application an extension was granted to June 15, 1974. No further extension was applied for and this return was eventually filed on April 3, 1975 with the explanation of his wife's continual illness and the penalty pertaining to timely file a return was not asserted.

Taxable income per investigation for 1973 totaled \$82,016 whereas the return filed on April 3, 1975 reported \$85,698.00.

Although acquitted of the civil rights charge, Sergeant White an admitted participant in the above and perjurer was permitted to testify regarding the alleged acts of participation by the defendant. This testimony was identical to his testimony at the first trial (A126-175).

THE DEFENSE:

1. Pervasive error in expert's testimony as to 1970 renders it useless. See U.S. v. Celentano, 391 F. Supp. 1252 (S.D.N.Y., 1975).

Government Exhibit 83 in evidence purports to prove that defendant failed to report approximately \$1,723 in income. Erroneously duplicate sales tax figures were included therein i.e., sales tax deduction claimed on return which includes sales tax included in the furniture purchases the net result of which would be to decrease expenditures by \$166.00. Although rent is shown as \$820.00 paid for 15 St. Andrew's Place, evidence does not indicate when and if paid in 1970. Automobile expenses of \$1,440, although allowed as a deduction in 1970 by the Internal Revenue Service, is not a deduction based on expenditures. It is the average that it allegedly cost to operate a vehicle inclusive of depreciation, maintenance, gas, etc. and thus the main portion of this deduction would probably be available for other cash expenditures. In view of the small amount of differences and the additional deductions allowable in computing taxable income, the criteria for deficiency, it is apparent that no tax deficiency results. Moreover the testimony does not support the government contention that the first Mrs. King commenced receiving alimony on April 1, 1970. It could have been in the middle of April thus reducing expenditures by at least another \$250.00. There is also no materiality with regard to the difference between the adjusted gross income

reported and proven by expenditures method and that reported on the return.

2. Venue.

Although the 1970 income tax return listed Commack, New York, as the mailing address, the evidence adduced at trial supports that the defendant resided in Yonkers, New York and filed his 1970 return in the Andover District. Thus none of the elements of the alleged crime took place in the Eastern District of New York. It should be noted that the mailing envelope attached to the return (Exhibit 47) shows that the return was mailed from New York. Thus no element of the crime was committed in the Eastern District of New York.

3. Failure of the government to prove that any crime was committed with regard to the return filed for the calendar year 1973.

The Internal Revenue Service, with regard to returns not timely filed, is authorized to assess a penalty for failure to file a return. Internal Revenue Code Section 6651(a), which is thus demanding of proof by the government than a criminal violation.

As a reasonable cause for late filing of a return it is policy not to assert said penalty for "any sound reason advanced by a taxpayer as the cause for delay in filing a return will be carefully analyzed to determine whether the penalty for delinquency should be asserted. Examples of sound causes for late filing which, if established, will be accepted as reasonable cause are (a) death or serious illness of the taxpayer or a

death or serious illness in his immediate family."

Due to the aforementioned government regulations and policy, the lateness of filing for this return is excusable. It should be noted that at the time of filing, no penalty was asserted. Thus the I.R.S. accepted the surrounding circumstances of Mrs. King's illness as reasonable cause for late filing and should thus be bound by this determination. Therefore this should bar the criminal violation presently attempted to be asserted.

4. The defendant's rights under the constitution were prejudiced by violation of due process and res judicata since he was previously acquitted for similar acts. Moreover based on this acquittal the agent's testimony with regard to cash on hand at the beginning of 1970 was apparently less than candid.

The United States Attorney per memorandum dated December 21, 1976 stated that the acquittal of defendant at the first trial (civil rights) could be due to the following. (1) King's acts in participation of acquiring this money was not part of the overall conspiracy; (2) King violated state rather than federal law; and (3) that his previous actions were barred by the statute of limitations. In all events based on the above representations of the Assistant U.S. Attorney, he is barred from stating that with reasonable certainty the defendant had no cash on hand at the beginning of 1970. If the first jury

did not believe that King participated in any of these acts, then allowing Sergeant John White (All5-175) to testify was prejudicial to the defendant and should not have been permitted. The first trial should have been res judicata as to any mention of corruption and should thus have been barred.

It is admitted that identical evidence both testimonial and documentary were used at both trials. The first trial resulted in acquittal and thus should bar the government from adjudicating this issue in a subsequent trial. See Defendant's Memorandum of Law in Support of Motion to Dismiss, which is included by reference herein.

5. Was the alleged false statement as related in count 6 material.

The government submitted no evidence to indicate materiality of the alleged misstatement as to filing of the 1971 return on the application of the defendant for an extension to file his 1973 return. If this error has no effect as the evidence indicates then there can be no materiality as to this item and thus no crime was committed.

6. Selective prosecution.

Defendant by reference herein of the previous motions filed by counsel adopts the rationale that he was a victim of selective prosecution in view of the fact that it is apparent that there has not been any recommendation for a criminal proceeding in a matter involving such a small sum of money.

7. Was an overt act proved for 1973.

The defendant's return for the year 1973 was excusably filed late and reported all income earned in that year including the \$30,000 in cash paid for the purchase of his home in Chappaqua, New York. Thus with regard to 1973 no affirmative act to defeat and evade tax could be shown attributable to the defendant. This overt act or affirmative act is necessary to properly assert a violation of Internal Revenue Code Section 7201.

8. It is apparent that illegal wire tap evidence was used with regard to obtaining leads for this investigation. It should be noted that a hearing will be held with regard thereto. This appeal reserves the right to raise this issue at a subsequent time.

CONCLUSION:

THE JUDGMENTS OF CONVICTIONS SHOULD BE SET
ASIDE.

Respectfully submitted,

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APPEEMAN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the ~~14~~14 day of June 1977 deponent served the within Brief upon

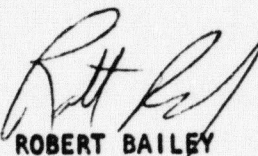
U.S. Atty. East. Dist. of NY

attorney(s) for

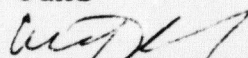
in this action, at

225 M Cadman Plaza East, Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 14 day
of June , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978